Supreme Court, U.S.
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No. 90-1789

In The

Supreme Court of the United States

October Term, 1990

DEXTER LEHTINEN,

Petitioner,

v.

S. J. and W. RANCH, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the recently amended Federal Tort Claims Act, 28 U.S.C. §2679(d), grants the federal district court's jurisdiction to overrule a certification by the United States Attorney General that a federal employee was acting within the scope of employment and, thereafter, to adjudicate purely state law tort claims against that employee.

(2) Whether an appellee on appeal may seek to modify the rationale and relief granted to a co-appellee by a district court order without filing a cross appeal challenging that order.

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Respondent, S.J. and W. RANCH, INC., respectfully prays that the Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT

Petitioner, Dexter Lehtinen, wants this Court to rule that a determination of a dispositive issue in a Federal Tort Claims Act be left to an interested party.

Furthermore, Mr. Lehtinen asserts that the dispositive issue[1] should be entrusted to the party that is not only responsible for providing the Federal employee's defense but also to make a non-biased scope of employment determination with a potential result of dismissing the Plaintiff's suit for lack of jurisdiction.[2]

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[1] Respondent brought an action in state court against the United States Attorney alleging libel, slander and evasion of privacy. The Petitioner caused the case to be removed to the United States District Court for the Southern District of Florida, and have the United States substituted as the defendant, No. 88-014213-CIV-JAG, Jose A. Gonzalez, Jr., J., 717 Federal Supplement 824, dismissed complaint. The trial judge dismissed the complaint due to the fact that Mr. Lehtinen was certified by the Attorney General's office as acting within the scope of his employment and, therefore, this case would be properly dismissed under the Federal Tort Claims Act since the cause of action could not be maintained against the United States under the Federal Tort Claims Act.

[2] Upon removal, the United States Government was substituted as the defendant instead of Dexter Lehtinen, United States Attorney for the Southern District of Florida. The designate of the Attorney General of the United States was another Justice Department official, Torts Branch Director, John Farley, III, who provided the scope of employment and certification to the Federal District Court.

The United States Court of Appeals, Eleventh Circuit, reversed and remanded the case to the district court and mandated it to conduct a *de novo* hearing on whether Defendant Lehtinen's conduct occurred within the scope of his employment. *See* 28 U.S.C.A. §2679(d)(2).

SUMMARY OF ARGUMENT

The Eleventh Circuit was cognizant of the due process implications inherent in treating the Attorney General's scope certification as absolute and dispositive of a primary issue of law and fact. Petitioner Lehtinen's construction of the statute would raise serious due process concerns since his interpretation would permit the Attorney General, Petitioner Lehtinen's boss, to be the final arbitrator of a controversy not only affecting the parties' rights but also the court's jurisdiction.[3]

In the event this Court does not adopt the Eleventh Circuit's construction of the statute, then in the alternative, the Respondent would argue that the Reform Act prohibition of the judicial view of the certification decision is a violation of the Plaintiff's rights of due process and equal protection as asserted in the alternative before the Eleventh Circuit.

There is no apparent conflict of the decision above with other cases such as might justify granting certiorari. The other cases seem to reach a decision similar or if not exactly as the Eleventh Circuit did in the case at hand. Finally, there is no special or important Federal interest in ruling on this matter since the other courts are permitting Federal court review of the Attorney General's certification. This petition for writ of certiorari should be denied.

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[3] See *Nasuti v. Scannell*, 906 Fed. 2d 802 (1st Circuit) 1990; *Springer v. Bryant*, 897 Fed. 2d 1085 (11th Circuit) 1990); *Sowell v. American Cyanamid Co.*, 888 Fed. 2d 802 (11th Circuit) 1989.

REASONS FOR DENYING WRIT

I.

The Decision Below Correctly Interprets the Statute by the Utilization of Legislative History.

In the Eleventh Circuit opinion reversing and remanding this case, the Court of Appeals carefully analyzed the legislative history which was consistent with its ruling. See *Arbour v. Jenkins*, 903 Fed. 2d, 416 (6th Circuit) 1990.

II.

This Case Does Not Have Broad National Significance.

The Eleventh Circuit has permitted Petitioner Lehtinen to exhaust its constitutional theories and statutory construction theories not only on his initial brief but also on a motion for rehearing. Petitioner Lehtinen's own employer, the United States Government, has joined Respondent at the Eleventh Circuit in arguing against Petitioner Lehtinen. The petition does not show that the Court of Appeals was incorrect and, more importantly, does not show a significance which would justify review by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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